that the deceased applied for and submitted five copies of the proposed sub-divisional plan. However neither this plan as submitted nor the one said to have been approved by the local authority had been made available to this court as to show that they referred to the one and same plan indicated by Clause 2. One cannot entirely rule out the possibility that the deceased might have changed his mind regarding his first layout plan since he last sent his application for its approval three months earlier and therefore had intended that the layout plan in the agreement shall be the final one and should prevail instead. This should be the necessary construction if the sending of one plan to the authorities before the agreement is to be reconciled with the sending of the purportedly same plan after the agreement.

But be as it may, clearly under Clause 5 the agreement requires that the application must be made by the respondents themselves as distinguished from the deceased. The fact that the agreement was made three months after the said letter (Exhibit WHW1) must give rise inevitably to the assumption that at the time when the agreement was made the parties were aware of the existence of the said letter. If they had provided nevertheless therefore that the respondents were to make the application to submit the layout plan it must have meant precisely what it said. Clearly the deceased had done so in order that the respondents rather than him bear the expenses and fees connected with the development of the land, as made clear in Clause 13. The purport of Clause 5 can be gathered also from Clause 12 of the agreement where he was stated to receive only the profit of the development without any liabilities. It was clear thus looking at Clauses 12 and 13 that once the application was made in the deceased's name to the appropriate authorities then all other applications which follow — conversion, architect and lawyer's fees as provided in Clause 13 would and could also be, if the respondents wish, (if not for Clause 5) be also in the deceased's name and he would legally and naturally be liable to pay for them and for the fees arising, if any, which was clearly as seen by Clause 13 not what the deceased wanted it to be. Therefore the requirement that the application for the layout plan be made by the respondents in their name was thus only to be conceived and the transfer of the land to the respondents under Clause 4 was only to make that application possible.

That notwithstanding, other provisions of the agreement have also clearly not been complied with which calls for a recission. There is no evidence to show that the application has been made for conversion, and separate titles obtained for the land as required under Clause 7 or for approval of the building plan as required under Clause 8 or that work had commenced under Clause 9. The supposed layout plan was purportedly approved by the authorities in October 1976. Nevertheless even up to November 29, 1978 which was the date of the present application, a period of two years, there was still no sign that they had made such application because no such application was ever produced. We would be surprised if indeed they had, otherwise we are at a loss to know why in spite of the several letters by the applicant's several counsel inquiring about the state of affairs between them, the respondents had maintained absolute silence.

I cannot but conclude that in the circumstances the applicant is entitled to the order prayed for as in the draft judgment. I would also order that the respondents pay the cost of the application.

Order accordingly.

Solicitors: *Chung & Huang; A.K. Lee & Co.*

SUBRAMANIAM v. TAN LEE LENG & ORS.

[O.C.J. (Salleh Abas F.J.) February 19, 1979]
[Kuala Lumpur — Civil Suit No. 40 of 1979]

Administrative Law — Co-operative Society — Declaration that election to Management Committee null and void — Whether statutory remedies exhausted — Co-operative Societies Ordinance, 1948, s. 49(2)(c).

Co-operative Society — Application for declaration that election to management committee null and void — Co-operative Societies Ordinance, 1948, s. 49(2)(c).

The plaintiff applied for a declaration that the election of the defendants to the Management Committee of a Co-operative Society was null and void because of forged proxy notes. The matter had been referred to the Registrar-General of Co-operatives and he had stated that the dispute should be settled by the court in accordance with section 49(2)(c) of the Co-operative Societies Ordinance. The defendants applied to have the writ of summons set aside.

Held: there had been sufficient compliance with section 49 and in particular with section 49(2)(c) of the Co-operative Societies Ordinance and therefore the application to set aside the writ of summons must be dismissed.

CIVIL SUIT.

Gopal Sri Ram (*C. Vijaya Kumar* with him) for the plaintiff.

F.H. D'Cruz for the defendants.

Salleh Abas F.J.: The plaintiff and the five defendants in this case are members of a cooperative society known as the N.U.T. Multipurpose Cooperative Society Limited registered under the Cooperative Societies Ordinance, 1948. On November 18, 1978, the 5 defendants were elected to the Management Committee of the Society which, according to the Byelaws of the Society, is the executive authority of the Society. The plaintiff alleged that the election of the defendants to the Management Committee was secured by forged proxy votes which were counted and acted upon and the first defendant was so informed of this fact on December 16, 1978, by one S. Tharmaratnam, the past Chairman of the Management Committee of the Society.

On January 9, 1979, the plaintiff commenced civil suit against the defendants asking for a declaration that the election of the defendants to the Management Committee was null and void because of the forged proxy votes, and that they are not entitled to act as Management Committee. The plaintiff was also asking for an injunction to restrain the defendants from acting as members of the Management Committee. On the same date (January 9, 1979) in an *ex parte* summons-in-chambers, plaintiff obtained an interim injunction to restrain the defendants from carrying out

their duties and powers as the Management Committee of the Society. In the meantime, the writ of summons, the statement of claim, and the Order for the interim injunction, were served on defendants No. 1, No. 2, No. 3 and No. 5 on January 15, 1979. As a result, conditional appearance was entered by the defendants on January 20, 1979.

Subsequently, on January 23, 1979, the defendants filed two notices of motion in which the defendants applied —

(1) to set aside the writ of summons dated January 9, 1979;

(2) to dissolve the Order of Interim Injunction of the same date;

(3) for an inquiry into the damage caused to the defendants as undertaken by the plaintiff in his application for the interim injunction; and

(4) the cost of the application.

This application came before me and it was argued by counsel for the defendants that the judicial proceedings taken by the plaintiff were premature and should not therefore be entertained by the court in view of section 49 of the Cooperative Societies Ordinance. On the contrary, the plaintiff argued that whatever was required to be done under that section was fully complied with and therefore judicial proceedings taken by the plaintiff is proper and as such the defendants' Notices of Motion should be dismissed with cost.

According to facts gleaned from the affidavits used in this case, after the election of the defendants on November 18, 1978, it was discovered that their elections were secured by forged proxy votes and other irregularities. Subsequently, on December 12, 1978, the Registrar General of Cooperatives was informed of these irregularities in a meeting attended by Mr. Menon, the Treasurer of the Society. At this meeting, the Registrar General advised that a Police report should be lodged. He also expressed the view that he could not intervene in the dispute. On December 16, the first defendant was informed of the irregularities in the election. The solicitor for the plaintiff on January 4 wrote to the Registrar General of Cooperatives alleging the irregularities of the elections of the defendants and asked the Registrar General for a consent to refer the dispute to the court (Exhibit CBK1). On January 9, the Registrar General wrote on the five defendants requiring them to comment on the allegation of irregular election made by the plaintiff within a week; otherwise the department would take the necessary action under section 49 of the Ordinance (Exhibit 'A' in Affidavit of Nallathamby dated January 22, 1979). In the meantime, on January 23, 1979, the Registrar General of Cooperatives wrote to the solicitor for the plaintiff stating that the dispute being a dispute under section 49 of the Cooperative Ordinance, is now required to be settled by court in accordance with section 49(2)(c) of the Cooperative Ordinance.

There is no explanation on the part of the defendants whether they have answered to the query asked for by the Registrar General on January 9. The time within which they have to reply to that letter should expire on January 16. It would appear from records that the defendants did nothing to reply to the letter by the Registrar General. Indeed in my judgment the first defendants appeared to be indifferent as he did nothing when he was informed of the allegation of the irregularities by Tharumaratnam on December 16. (paragraph 21 of Tharumaratnam's Affidavit dated January 9 — enclosure (6)). The defendants only took action after they had been served with the Writ of Summons, the Statement of Claim and the Interim Order of Injunction on January 15, by entering conditional appearance on January 20, and filed these two motions on January 23 to set aside the Writ and the Interim Order.

There is no need for me to refer to any authorities to decide this case as I take it that the law on this matter is very clear, in that the court will not entertain any judicial proceedings where remedies provided for by statute have not been complied with. The question here is whether or not the process under the statute has been complied with. I agree with the submission made by Mr. Sri Ram, counsel for the plaintiff/respondent, that whatever acts which must be complied with under section 49 of the Cooperative Ordinance had in fact been fully complied with. According to various affidavits and the evidence available on record, the defendants did nothing until they were served by the Writs, although the first defendant was informed of the irregularities as early as December 16 last year and they were required by the Registrar General of Cooperatives to answer the charges made against them under a letter dated January 9. Furthermore, it is clear that the Registrar General in this case, as evidenced by his letter dated January 23, decided that the matter should be settled by court. In my view, all these facts amount to sufficient compliance with section 49 and, in particular, subsection (2)(c), of the Cooperative Ordinance. Hence I dismiss these two motions with costs.

Motions dismissed.

Solicitors: *James Foong & Co.; Vohrah & Tan Chee Lan.*

PERBADANAN KEMAJUAN NEGERI SELANGOR v. PUBLIC BANK BHD.

[O.C.J. (Mohamed Azmi J.) February 27, 1979]

[Kuala Lumpur — Civil Suit No. 144 of 1974]

Contract — Building Contract — Guarantee — Security deposit by bank — Consideration — Whether there have been variations in building contract — Whether claim on guarantee time-barred — Whether claim maintainable when liability of principal not ascertained — Contracts Act, 1950, ss. 79, 80 & 86.

In this case a construction company was successful in a tender for pile foundation and sub-structure for a building project. Under the contract the construction company agreed to carry out the works and agreed, as a condition precedent to the commencement of any work, to deposit with the plaintiffs a cash amount or an approved banker's guarantee equal to 5% of the contract soon sum. The construction company obtained a banker's guarantee from the defendant bank and the work commenced. The construction company subsequently got into financial difficulties and had to abandon the work. The plaintiffs claimed the amount guaranteed in the banker's guarantee from the defendant bank. Liability was denied on four main grounds:- (1) there had been variations in the building contract; (2) no consideration for the guarantee had been given; (3) the claim was time-barred and (4) the liability of the defen-